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Division III
State of Washington

No. 34599-8-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

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JEFF and DONNA ZINK,

Appellants & Cross-Respondents

v.

CITY OF MESA

Respondent/Cross-Appellant.

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**ON APPEAL FROM THE SUPERIOR COURT OF FRANKLIN COUNTY, STATE OF WASHINGTON**

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# REPLY BRIEF OF RESPONDENT / CROSS-APPELLANT

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## I. INTRODUCTION

"[T]he purpose of the [Public Record Act's ("PRA")] penalty provision is to deter improper denials of access to public records."[1] Courts should therefore use their "considerable discretion" to set penalties at an amount that is "adequate incentive to induce future compliance."[2] These penalty awards should not "create a windfall only for individuals who make a voluminous request" because such windfall penalties "do nothing to encourage disclosure for reasonable requests."[3] To determine the penalty amount needed to serve as a deterrence, the size of the jurisdiction is crucial because "the penalty needed to deter a small school district and that necessary to deter a large county may not be the same."[4]

For a small town like Mesa, with approximately 500 residents, the trial court's $175,000 PRA penalty is greater than the amount Mesa could ever spend on future compliance because award exceeds a full year of Mesa's annual general fund unrestricted tax revenue (hereinafter "annual tax revenue").[5] Proportionally, this award is almost 50 times greater than

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[1] *Yousoufian v. Office of Ron Sims*, 168 Wn. 2d 444, 462-63, 229 P.3d 735 (2010) ("*Yousoufian 2010*").
[2] *Yousoufian 2010*, 168 Wn.2d at 462-63, 468.
[3] *Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 435, 98 P.3d 463 (2004) ("*Yousoufian 2004*").
[4] *Yousoufian 2010*, 168 Wn. 2d at 462-63

[5] Clerk's Papers 2 ("CP2") at 267-68 ¶¶3-4. (*NOTE, the Clerk restarting the page numbering for the City's Supplemental Designation, and thus citations to these supplemental materials will be designated CP "2".)* The City also collects funds for sewage services, but can only spend utility revenue on utility-related services, and thus those funds are not included in this total. *Id.* at ¶¶5-7. The City also receives state grant funds, which are also restricted. Id. at ¶¶3-4.

any PRA penalty recorded in appellate decisions.[6] If the same $350-per-resident penalty were imposed on nearby Pasco, the penalty would exceed $23,800,000.[7]

The trial court abused its discretion when it imposed this massive penalty on Mesa, because it greatly exceeds any amount necessary to induce future compliance and is disproportionate to any PRA penalty a court would impose on a larger jurisdiction. Moreover, the trial court also abused its discretion when it relied on an ambiguous memorandum Mesa received from the Municipal Research and Services Center ("MRSC memo") to justify quadrupling the daily penalty rate for five separate requests, which had the effect of increasing the total penalty award by one third.

The Court should remedy these errors by reducing the penalty amount by approximately 2/3 to $58,000, which equates to approximately 1% of Mesa's annual tax revenue for each of the 33 violations at issue. While this reduced penalty would still be a massive PRA penalty given Mesa's tiny population and limited resources, it would at least be proportionally similar in comparison with the largest PRA penalties imposed in prior cases, and would not unfairly punish the taxpayers of Mesa, who are of course responsible for paying any penalty. Moreover, it is proportionally large enough to induce future compliance by Mesa and to

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[6] Proportionately and in total dollar amounts, the penalty is *Wade's Eastside Gun Shop, Inc. v. Dep't of Labor & Indus.*, 185 Wn.2d 270, 372 P.3d 97 (2016) is the largest penalty recorded in appellate decisions. The $502,827 penalty amounted to 2.1% of the Department of Labor and Industries general fund budget of $23,491,000 in 2015. See Laws of 2015, Ch. 5, §1216.

[7] Pasco's population in 2015 was estimated at 68,240. CP 273 n.3. $350x68,240 = $23,884,000

deter any other jurisdiction not wanting to pay out 1/3 of its annual tax revenue in PRA penalties.

## II. SUPPLEMENTAL STATEMENT OF THE CASE

Mesa's open brief provides an overview of the relevant facts. The Zinks, however, have disputed Mesa's factual claim regarding the impact of the MRSC memo on the total penalty award. Mesa asserts that the trial court's decision to increase the penalty rate for five violations effectually increased the total penalty award by 33%, because the daily rate increase applied to 5650 penalty days. The Zinks assert that it only affected the penalty rate for 3445 days and had a smaller impact. In this section, Mesa will provide a comprehensive summary of the relevant facts to explain why Mesa is correct.

The primary reason Mesa is facing such a high penalty is because nine of the violations at issue persisted for over five and a half years, resulting in an accumulation of over 2000 penalty days per each of the nine violations:

| | Violation | Penalty days[8] |
|---|---|---|
| 1. | #6: 21 Code Files – Redaction | 2093* |
| 2. | #8: Resignation letters | 2129* |
| 3. | #9: MRSC records | 2103 |
| 4. | #12: T. Standridge Timecard | 2075 |
| 5. | #14: Phone/Fax log | 2062 |
| 6. | #15: 18 Residential files | 2062* |
| 7. | #16: 11 Residential files | 2062* |
| 8. | #22: Sharp Complaint | 2059* |
| 9. | #23: Cade Scott Reply | 2038 |

[8] See CP 2471.

*violation penalty rate increased
based on the MRSC Memo

The violations persisted for this extended period in large part because the trial court originally ruled in Mesa's favor and dismissed the Zinks' claims. This ruling was subsequently reversed and after holding a new hearing, the trial court found 33 separate violations, including these nine violations that were still ongoing at the time.

Because Mesa was not entirely responsible for the delayed production, the trial court used variable penalty rates, and divided the five and a half years into four penalty periods[9] as follows.

| Period | Date rage | #of days [10] |
|---|---|---|
| Primary | Date of violation to June 24, 2003 | Variable |
| Secondary | June 24, 2003 to May 13, 2005 | 689 |
| Tertiary | May 14, 2005 to August 23, 2007 | 832 |
| Quaternary | August 24, 2007 to November 7, 2008 | 441 |

The trial court set the daily penalty rate for all nine of these violations at $20-per day during the Secondary period, reduced that rate to $1-per-day[11] during the Tertiary period, and then returned the penalty rate to $20-per-day for the Quaternary period.[12] For five of these violations – violations 6, 8, 15, 16 and 22 – the trial court set the initial penalty rate at

[9] The trial court refers to these as both periods and "tiers" but this brief will use "periods" for consistency sake.
[10] CP 2414-15, ¶7.a, 2471.
[11] Because the trial court made an across-the-board reduction of the penalty by 50%, this rate was reduced to $0.50 per day. But this reduction was not made until June 29, 2016, all of the filings and transcripts refer to the original penalty rates. Moreover, the dispute between Mesa and Zinks regarding the factual record relates to what portion of the penalty was affected by the trial court's ruling regarding the MRSC memo, which would remain the same before and after the reduction. Therefore, to avoid confusion, this brief will reference the original rates actually referenced, rather than the reduce rate actually entered.
[12] RP (5/10/16) at 21:21; 30:14-15; 34:23; CP 2415 ¶7.c., 2471

$5-per-day because Mesa had redacted personal contact information in these records in good faith, largely based on legal advice.[13]

This changed on June 24, 2003, however, when Mesa received the MRSC memo (attached as Appendix B to the City's Opening brief and found in the record at CP 1062-63) that addressed when contact information can and cannot be redacted. The trial court ruled that this memo should have prompted Mesa to re-evaluate its exemptions, and thus justified an increase in the penalty rate for the Secondary and Quaternary periods:

> Court: And so it's -- I'm going stand by my original ruling, because it was part of a pattern of stubbornness on the part of the city, even faced with that memo to not go back and reexamine the whole thing. So it was a more global view from my point of view rather than on each individual type of exemption. So I'll have to deny that one as well. And we'll –
>
> Ramerman: Thank you, your Honor
>
> Court: -- $20 per day on each one of those. Were those the tertiary or quarternary [sic] period?
>
> Ramerman: The fact that the secondary and the quarternary [sic] but not the tertiary.
>
> Court: All right. Good. All right.[14]

Thus, because the $15-per-day increase applied to all 689 days of the Secondary period and 441 days of the Quaternary period for each of the five violations, the increase applied to 5650 days total (689+441 = 1130 x

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[13] CP 2471; see also CP 2442 & RP (5/10/16) at 20:6 to 21:24 (Violation 6); 2444 & RP (5/10/16) at 22:14-23:22 (Violation 8), 2451 & RP (5/10/16) at 29:14- 30:16 (Violation 15); CP2452 & RP (5/10/16) at 30:17-22 (Violation 16); 2458 & RP (5/10/16) at 34:6-24 (Violation 22). Regarding the rate referenced see supra note 11.

[14] RP (6/29/16) at 33:24 to 34:11.

5 = 5650). This ruling therefore added $84,750 to the total penalty ($15 x 5650 = $84,750), increasing it by 33% from $268,204 to $352,954.[15]

The Zinks, however, argue that the trial court only relied on the MRSC memo to increase the penalty rate for the Secondary period. This claim is based on Finding of Fact 7.d, which explains why the trial court increased the daily penalty rate during the Quaternary period after the penalty rate had been reduced to $1-per-day during the Tertiary period. The Zinks are asserting that this paragraph provides a distinct justification for increasing the penalty rate from $5 to $20 per day.

There are two problems with the Zinks' assertion. First, as noted, the trial court expressly affirmed at the June 29th hearing that it was relying on the MRSC memo to increase the penalty rate during the Secondary and Quaternary periods.[16]

Second, the Zinks' argument is inconsistent with how the trial court treated the four violations that were not affected by the MRSC memo. If the trial court was holding that a new reason justified adding $15-per-day to the five violations, the Court would have also increased the penalty rate for these four other violations by $15-per-day. But for those four violations, the trial court used the same penalty rate during the Quaternary period that it had used during the Secondary period. This shows that the trial court's Finding of Fact 7.d was only intended to justify the trial court's decision to re-instate the penalty rate that was in place during the Secondary penalty

[15] As noted these dollar amounts were all cut by 50% but the ratios remain the same.
[16] RP (6/29/16) at 33:24 to 34:11.

period, which for the five violations at issue would include the trial court's increase based on the MRSC memo.

The Zinks might have been confused by ambiguities in the trial court's findings. For three of the four violations not affected by the MRSC memo (violations 9, 12, 14), the trial court's conclusions of law state that penalties are only being set for a Primary and Secondary period.[17] But given the trial court's unambiguous Finding defining the date range for the four penalty periods, the Findings setting penalties only for two penalty periods is clearly a mistake – the trial court simply lumped in the Secondary and Quaternary periods into the Primary period and moved the Tertiary period into the Secondary period. The fact that the trial court properly broke out the penalty periods for the fourth violation (violation 23)[18] further confirms that this was simply a mistake.

## III. ARGUMENT

### A. The Trial Court's Increase of the Penalty by 1/3 Based on the MRSC Memo Was Arbitrary

The trial court originally found that Mesa acted in good faith when it redacted contact information in the records that encompass Violations 6, 8, 15, 16 and 22, even though those redactions were erroneous.[19] The Zinks have not challenged these findings of good faith, making them verities on appeal.[20] The trial court then ruled that once Mesa received the MRSC

[17] CP 2425-26. ¶¶9, 12, 14
[18] CP 2428 ¶23
[19] See supra note 13.
[20] *Francis v. DOC,* 178 Wn. App. 42, 64, 313 P.3d 457 (2013).

memo – which did not specifically address any of those violations – Mesa was no longer acting in good faith because Mesa should have re-examined its assertions of exemptions for these five violations. Mesa's failure to do so, according to the trial court, justified a massive increase in the penalty.[21]

The problem is that nothing in neither the MRSC memo itself, nor the law as it existed in 2003 would have caused the City to change its concededly good faith decision to redact contact information for these five violations. While the MRSC memo did note that there is no general exemption for contact information that would apply to invoices – the records Mesa had asked about for a request that is not at issue in this lawsuit – the MRSC memo went on to identify several exemptions that did justify the redaction of contact information, and these exemptions happen to be the exact exemptions the City was relying on to justify its redaction for the records that make up Violations 6, 8, 15, 16 and 22. Thus, rather than prompting Mesa to re-examine those exemptions, the MRSC memo would have re-enforced the City's decision to make those redactions – which the trial court found were made in good faith.

Moreover, even if the MRSC memo had prompted Mesa to examine its exemptions based on the law as it existed in 2003, that analysis would not have prompted Mesa to rethink its decision to redact the contact information at issue. To justify most of these redactions, Mesa was relying on a "linkage" argument to apply the utility customer exemption to these

[21] RP (6/29/16) at 33:23-34:5.

records.[22] Every household in Mesa is a utility customer because Mesa supplies water and sewer services. At the time, Mesa kept a single file for each Mesa household, organized by address, where utility records and all other resident records were stored. Mesa reasoned that if the requestor knew how the City kept its records – which Ms. Zink did know – and Mesa disclosed any record from that file with an address, Mesa would be disclosing a utility customer's address. Therefore, although the records at issue were not utility records, the linkage argument justified redacting contact information. See CP2 at 126-31.

By ruling that the MRSC memo should have caused Mesa to re-evaluate its exemptions, the trial court has ruled that the MRSC memo should have caused Mesa to discover that the linkage argument was legally incorrect. The problem with that argument is that back in 2003, it was not at all clear that this linkage reasoning was wrong. No Washington court had rejected it prior to 2003 – that would not occur until the Supreme Court's decision in *Koenig v. City of Des Moines* in 2006,[23] and litigants would continue to assert linkage arguments until 2011.[24] Thus, Mesa's re-examination of Washington law in 2003 would not have put Mesa on notice

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[22] See RCW 42.56.330.

[23] *Koenig v. City of Des Moines*, 158 Wn.2d 173, 142 P.3d 162 (2006). Violations 6, 15 and 16 were based on the utility customer exemption. The City relied in part on the same linkage reasoning for violation 22, which was a complaint by a utility customer. The contact information for Violation 22 was also redacted because the document was a complaint about a code inspector, relying on RCW 42.56.240(1) and (2). These exemptions apply to complaints of code violations, making the City's reasoning not illogical.

[24] *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 259 P.3d 190 (2011).

that its reliance on the linkage reasoning was improper. Moreover, if Mesa had examined federal law governing FOIA cases -- the only other possible source of authority on this issue – Mesa would have seen that federal courts had embraced the linkage argument to expand the scope of exemptions for contact information.[25]

Likewise, there were no clear Washington decisions regarding the two other exemptions Mesa was relying on[26] – not only were these exemptions endorsed by the MRSC memo, but no clear Washington precedent would have informed Mesa that it was erroneously asserting those exemptions.

Thus, it is not clear what authority Mesa should have consulted once it received the MRSC memo that would have prompted Mesa to reconsider its redactions of contact information. Given the fact that (1) Mesa had acted in good faith, based in part on legal advice when it originally made the redactions at issue; (2) the contents of the MRSC memo supported those redactions; and (3) the law as it existed in 2003 seemed to support (and certainly did not refute) Mesa's decisions, the trial court's finding that the MRSC memo should have prompted Mesa to change its legal position is not supported by the record and is error. This makes the trial court's decision to quadruple the penalty rate for these violations, resulting in the overall 33% increase of the total penalty, an arbitrary one.

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[25] *See, e.g., Hunt v. FBI*, 972 F.2d 286, 288 (9th Cir. 1992); *Anteonelli v. FBI*, 721 F.2d 615, 618 (7th Cir. 1983).

[26] Mesa also relied on the exemption for employee addresses for violation 8 (see RCW 42.56.250(3) and complainant contact information for violation 22. CP 131, 140.

This scenario is similar to the scenario that occurred in *Sargent v. City of Seattle*.[27] There, the trial court arbitrarily increased the penalty rate from $5 to $100 per day, based on factual developments that the trial court held should have put Seattle on notice that the exemption at issue did not apply.[28] The Court of Appeals found this increase to be disproportionate and arbitrary given that Seattle had a good-faith basis for asserting the exemption.[29] The Supreme Court ultimately ruled that Seattle was incorrect in its assertion of the exemption at issue, but agreed that the $100-per day rate had to be vacated and the case remanded for a proper application of the *Yousoufian* factors.[30]

While the facts the case at bar differs from *Sargent* in that here, the trial court was applying the *Yousoufian* factors, the trial court's basis for the massive penalty increase was equally arbitrary because nothing about the MRSC memo would have in any way suggested that Mesa's assertion of exemptions for contact information were invalid. If anything, the MRSC memo would have reinforced Mesa's belief that for the particular records at issue in Violations 6, 8, 15, 16 and 22, it had properly redacted contact information based on the specific exemptions identified in that memorandum.

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[27] *Sargent v. City of Seattle*, 167 Wn. App. 1, 24-25, 260 P.3d 1006 ("*Sargent I*"), *affirmed in part, reversed in part on other grounds*, 179 Wn.2d 376, 397-98, 314 P.3d 1093 (2012) ("*Sargent II*").
[28] *Sargent I*, 167 Wn. App. at 9.
[29] *Sargent I*, 167 Wn. App. at 24-25.
[30] *Sargent II*, 179 Wn.2d at 397-98.

The Zinks go into great detail to argue that the City's initial assertion of the exemptions were unreasonable. But the trial court found that the City was acting in good faith initially, and the Zinks have not assigned error to those findings. The only issue before the Court is whether the addition of the information Mesa learned from the MRSC memo should have caused the City to doubt that its initial redactions were improper. The Zinks have failed to identify anything in the MRSC memo that would have changed the good-faith nature of Mesa's initial decision to redact contact information based on the linkage reasoning.[31]

## B. The $175,000 Penalty Is Grossly Excessive and Disproportionate and Should Therefore Be Reduced

### 1. Punishing Taxpayers With Penalties That Vastly Exceed the Amount to Deter Future Violations Is Contrary to the Purposes of the PRA

The ultimate purpose of the PRA is to allow the people to "maintain control over the instruments they have created"[32] while being "mindful of ... the desirability of the efficient administration of government."[33] Nothing evidences a loss of control of government more than the imposition of rules that allow a handful of government employees to forfeit a full year of taxes, and that allows those taxes to be paid to the town's former mayor. If anything, this is the type of massive waste that the PRA is meant to help

[31] This is true whether or not a P.O. Box address qualifies as a personal address under RCW 42.56.250(3), or whether elected officials are entitled to rely on that exemption. The issues is not whether that exemption in fact applies – Mesa has conceded the violation; rather the issue is whether the MRSC memo contained any information that undermined the City's initial good-faith determination that the exemptions applied.
[32] RCW 42.56.030.
[33] RCW 42.17A.001(11).

prevent. Yet the trial court's $175,000 penalty award – equal to more than 100% of Mesa's annual tax revenue – imposes this exact harm.

PRA penalties are meant to deter bad faith conduct and to motivate agencies to invest in compliance to avoid future violations.[34] Since this lawsuit was filed, Mesa has invested in education and adopted new procedures to ensure compliance. This effort has worked – the City has not had another PRA lawsuit since the Zinks filed their lawsuit in 2003.[35]

Outside of this case, no Washington court has ever ruled that a PRA penalty award anywhere near the magnitude of this penalty was necessary to motivate compliance. Nothing in the record shows that this massive penalty is necessary here. This is not to say that the violations Mesa committed were not serious – Mesa concedes a large penalty is warranted. But "large" is relative – for a small jurisdiction like Mesa, a $58,000 penalty -- $116 per resident – is a massive penalty award that cannot beignored.[36]

2. The Trial Court's Penalty Greatly Exceeds Any Penalty that Would Be Imposed on a Larger Jurisdiction

It would be grossly unfair to impose a penalty that equals 100% of any jurisdiction's annual tax revenue based on the conduct of government employees when that amount is not compensatory. Nor would any court

[34] *See, e.g., Yousoufian 2010*, 168 Wn.2d at 463; *see also* CP2 340-343 (cataloging quotations from over a dozen PRA cases where courts have emphasized the importance of deterrence).
[35] CP2 at 1 ¶2; CP2 at 268 ¶¶4-7.
[36] *Yousoufian 2010*, 168 Wn. 2d at 462-63 ("the penalty needed to deter a small school district and that necessary to deter a large county may not be the same.").

even contemplate imposing a penalty of that magnitude on a large jurisdiction like Pasco, Marysville, Mercer Island or King County. Washington state residents who live in small towns like Mesa should not be held to a different standard.

The unfair nature of imposing significantly greater proportioned penalties on small jurisdictions is particularly glaring when the cost per resident is considered. Prior to the *Wade's* decision, the penalty issued in *Yousoufian* was the largest PRA penalty affirmed in an appellate case. That penalty was slightly larger than the preliminary penalty determined by the trial court and totaled $371,340. The population of King County in 2010 was 1,931,249.[37] On a per-resident basis, this penalty amounted to $0.19 per resident. In contrast, the $175,000 penalty for Mesa amounts to $350 per resident – a penalty that is 1,800 times higher per resident. A $175,000 penalty on nearby Pasco (population 68,240) would only amount to $2.56 per resident, less than 1% of the penalty per resident to be imposed on Mesa.

This is not to say penalties must be perfectly proportionate base on population. The penalty advocated by Mesa – $58,000 – is still a massive penalty of $116 per resident. A similar penalty for King County would total $224,024,884. For Pasco it would total $7,915,840. While these totals are still likely far outside of the bounds of any penalty a court would impose,

[37] See Population Change by Race/Ethnicity in King County 2000-2010 (available at http://www.kingcounty.gov/~/media/depts/executive/performance-strategy-budget/regional-planning/Demographics/May%202017%20Updates/Cen2010-race_ageKCnotes.ashx?la=en) (last visited 8/21/17).

this demonstrates that the Court is still sending a strong deterrent message by imposing a $58,000 penalty on Mesa.

3. The 1%-Per-Violation Limiting Principles Will Help Prevent the Waste of Public Dollars

After the Supreme Court's ruling in *Wade's* authorizing courts to set PRA penalties on a per-page basis, all Washington jurisdictions face the real risk of potential, massive PRA penalties that can easily rise into tens of millions of dollars. Even if the chance of a court imposing a massive multi-million-dollar penalty is remote, agencies will be greatly influenced by this massive risk, especially because there is no insurance for PRA claims.

This is especially true if the Court affirms a penalty that equals 100% of an agency's tax revenue – this tells every other jurisdiction and PRA plaintiff that when it comes to PRA penalties, "sky's the limit." This will result in the waste of the public's tax dollars in two ways.

First, it will make the settlement of PRA claims more difficult because requestors will demand much larger settlements. This is illustrated by the recent Division I decision in *Rufin v. City of Seattle*[38]. There, the City tried to resolve the lawsuit by making a $40,000 settlement offer.[39] The requestor, however, demanded over $11 million and therefore declined the offer.[40] Ultimately, the Court awarded a mere $1,688 in penalties.[41]

[38] *Rufin v. City of Seattle*, 199 Wn. App. 348, 398 P.3d 1237 (2017).
[39] *Rufin*, 199 Wn. App. at 353 (¶10).
[40] *See* Respondent/Cross-Appellant City of Seattle's Brief at 48 (available at https://www.courts.wa.gov/content/Briefs/A01/748254%20Respondent%20Cross-Appellant's.pdf) (last visited 8/21/17).
[41] *Rufin*, 199 Wn. App. at 354 (¶11).

This case illustrates that as long as requestors believe these massive penalties are a realistic possibility, it will make settling much less likely. This in turn wastes the tax dollars the agency will have to incur litigating the dispute, which is contrary to the purpose of the PRA.[42]

Second, tax dollars will be wasted because some agencies will be motivated to make much larger payments to settle PRA lawsuits that involve a large number of documents because those agencies cannot risk a penalty award that equals 100% of its annual tax revenue or more. Take for example, the following real-world hypothetical:[43] Assume an agency responding to a large PRA request inadvertently overlooks a file folder that it later learns held 5431 responsive emails and does not discover that file folder for 503 days. After *Wade's*, if penalties are set per email, the penalty could be as high as $273,179,300 – an amount that would cripple any agency in the state. Even though the chances of a court imposing such a massive penalty is remote, the mere risk of such a devastating outcome will motivate some agencies to make larger settlement offers to avoid the risk, however remote, of a crippling judgment.

If, on the other hand, the Court adopts a general limiting principle along the lines Mesa is advocating for, it will let agencies (and requestors) know that that courts imposing PRA settlements will make a proportionality

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[42] *See DOC v. McKee*, -- Wn. App. --, 2017 WL 2953421 at *2 ¶12 (Div. III, July 11, 2017) (noting how agencies are often willing to settle to avoid discovery costs in PRA litigation).

[43] This hypothetical is based on the actual facts at issue in Beavers v. City of Kirkland, King Co. Super. 16-2-13004-6SEA (2016).

determination, rather than a mechanical application of the *Yousoufian* factors that might result in a massive, crippling judgment.

This limiting factor will not send the message to agencies that PRA compliance is unimportant or that requestors can be ignored – a penalty that totals even 1% of an agency budget is still a massive penalty that exceeds PRA penalties imposed in almost every PRA case to date. This is illustrated by the Justices' consideration of a high-end penalty in the *Yousoufian* case. The high-end penalty in that case would have totaled $30,697,100 if it was calculated on a per-record basis.[44] The trial court rejected the per-record standard and its resulting massive penalty because it greatly exceeded "any amount needed for deterrence."[45] The Supreme Court agreed that it would be "absurd" and contrary to the intent of the Legislature to interpret the PRA as mandating such a large penalty.[46] Justice Sanders disagreed, noting that a $30 million judgment would only amount to 1% of King County's operating budget and this harsh medicine might be necessary to motivate agencies to comply with the PRA:

> Even assuming King County was penalized the entire amount of what Mr. Yousoufian claimed to be the maximum allowable fine, it would still amount to only one percent of King County's 2003 operating budget. Docking an agency one percent of its operating budget might be just the necessary medicine to force an agency into full PDA compliance.[47]

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[44] *Yousoufian 2004*, 152 Wn.2d at 436.
[45] *Yousoufian 2004*, 152 Wn.2d at 427.
[46] *Yousoufian 2004*, 152 Wn.2d at 431, 436.
[47] *Yousoufian 2004*, 152 Wn.2d at 444 (Sanders, J., dissenting in part).

Thus, even the Justice who supported the harshest penalty recognized that a penalty totaling 1% of an agency budget would be sufficient deterrence to motivate an agency to comply with the PRA.

4. Using a Proportionality Analysis Is Consistent with Washington's Approach to Statutory Penalties

The Zinks properly note that the Court cannot impose a hard cap of 1% on PRA penalties – only the Legislature can amend the statutory provisions of the PRA.[48] But the Court can and should follow the lead of the Supreme Court in *Yousoufian 2010* and adopt guiding principles regarding PRA penalties "to provide guidance to trial courts exercising their discretion so as to render those decisions consistent and susceptible to meaningful appellate review."[49] The Supreme Court's emphasis on "consistent" rulings demonstrates that proportionality with prior penalty awards is a valid consideration. Outside of the PRA context, proportionality is a standard tool courts use to ensure that the discretionary authority given to trial courts to impose penalties and punishments does not lead to arbitrary results.[50] It is therefore appropriate for courts imposing PRA penalties to use this reasoning.

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[48] Contrary to the Zinks' claim, the voters never approved the $5-$100 penalty range – the original version of the PRA approved by voters in 1972 had a $0-$25 per day penalty range, which was amended by the Legislature in 1992. See Laws of 1973, Ch. 1, §34; Laws of 1992, Ch. 139 §8.

[49] *Yousoufian 2010*, 168 Wn.2d at 465.

[50] *See, e.g., In re Disciplinary Proceeding Against Hicks*, 166 Wn.2d 774, 789, 214 P.3d 897 (2009) (noting sanctions for attorney misconduct are subject to a proportionality analysis); *State v. Ames*, 89 Wn.App. 702, 709-10, 950 P.2d 514 (1998) (noting that the constitutional prohibition on cruel and unusual punishment mandates a proportionality analysis).

As noted in Mesa's opening brief, prior to the *Wade's* decision, no court had ever imposed a PRA penalty that exceeded 1% of an agency's annual general fund budget – the equivalent of Mesa's annual unrestricted general fund tax revenue.[51] That *Wade's* penalty award was only 2.1% of the Department of Labor and Industry's general fund budget, based on the equivalent of over 5000 separate violations.[52]

Thus, if the Court agreed with Mesa's proposal of using a 1% per violation as a soft cap for the high end of PRA penalty awards, it will not undermine the deterrent purpose of imposing PRA penalties. A 1% penalty is still an extremely impactful penalty. History proves this out – prior to *Wade's*, every court imposing PRA penalties has determined that penalties significantly below the 1% mark were sufficient to motivate agencies to invest more in PRA compliance.[53] Other than *Wade's*, no court has ever determined that a penalty amount even close to this 1% mark was necessary to deter future violations. Thus, this cap will not weaken the PRA.

5. The $175,000 Penalty Award Is Arbitrary

Finally, because the trial court reached its original penalty determination through a mechanical application of the *Yousoufian* factors without fully considering the number of days to which that penalty rate will apply, the total penalties awarded for each individual violation are arbitrary,

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[51] Opening Brief or Respondent/Cross-Appellant at 42-44.
[52] CP2 at 108 & n.15 (noting L&I general fund budget). Because penalties were calculated per page, the Supreme Court effectively treated each page as a separate violation.
[53] *See, e.g., Adams v. DOC*, 189 Wn. App. 925, 954, 381 P.3d 749 (2015) (affirming trial court ruling that $24,535 penalty for DOC's bad faith conduct was sufficient to deter future violations, taking into account DOC's extremely large budget).

resulting in a total penalty award that is also arbitrary. This is apparent when you compare the penalty rates with the total penalty for each individual violation. The daily penalty rates roughly track the egregious nature of the violation. But as demonstrated in Mesa's opening brief, when you compare the 10 violations with the highest penalty rate with the violations with 10 largest penalty awards, only 2 of the most egregious violations are on that list.[54] This nearly complete disconnect demonstrates that the trial court's method of setting penalties was flawed.

And while the trial court partially accounted for this arbitrariness by reducing the total award by 50%, the total penalty award still greatly exceeds any amount needed to deter future misconduct. The problem with this mechanical application of the penalty rates it that it fails to account for the fact that the City's blameworthy conduct primarily occurs at the time of the violation – not five years later. If a court is going to impose the same penalty rate for the 489 days in the Secondary period as it is going to impose for the 441 days of the Quaternary period, its penalty rate should be reduced to reflect the decrease in the blameworthy conduct in the latter period. Otherwise, the total penalty amount will be artificially inflated. The trial court's mechanical process failed to properly account for the number of penalty days, which resulted in the complete disconnect between the penalty rates and the total penalty awards.

The trial court's decision not to reduce the penalty further was also based on faulty reasoning regarding deterrence. The trial court explained

[54] Opening Br. Of Respondent/Cross-Appellant at 37-38.

that because Mesa had been facing a minimum daily penalty of $5-per-day, this showed that the risk of a $115,585 penalty was insufficient deterrent to get Mesa to follow the law and the total penalty should exceed that amount.[55]

That reasoning would make sense if, for example, a daily penalty was imposed as a contempt sanction where the party can end the daily penalty by taking a particular action. But here, Mesa had no way of knowing how long the litigation would drag out. Moreover, prior to the trial court's ruling in July 2008 finding PRA violations, Mesa had reason to believe it had complied with the law. Given that Mesa did not know it was facing any penalty prior to that ruling, it cannot be said that Mesa was not deterred by the risk of some unknown possible penalty.[56]

## IV. CONCLUSION

The PRA is intended to give the residents of this state a tool to help them control government and protect their "investment" (re their tax dollars) in "the instruments that they have created." The trial court's ruling undermines that result by requiring Mesa to waste an entire year's worth of tax payments, to be paid out to a private citizen who has not suffered any

[55] RP (6/29/16) at 59:11-19.

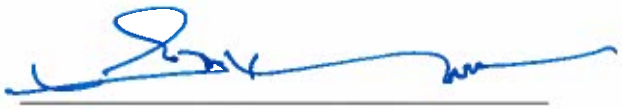
[56] The Zink's assertion that Mr. Ramerman's redaction to his attorney fee bills somehow demonstrates that Mesa has not learned its lesson is specious. First, the redactions were made by Mr. Ramerman, not Mesa. Second, the redactions were proper redactions of work-product information. See CP2 346-47 (citing *Clarke v. Am. Commerce Bank*, 974 F.2d 127, 129 (9th Cir. 1992); *Chaudhry v. Gallerizzo*, 174 F.3d 294, 402-03 (4th Cir. 1999)). Finally Mesa's ultimate decision to produce the unredacted invoices shows it has changed its attitude regarding the assertion of exemptions.

actual damages. This result, in a very real sense, undermines the public's ability to control government and should be rejected by the Court.

RESPECTFULLY SUBMITTED this 5th day of September, 2017.

Respectfully Submitted,

Attorneys for Respondent/
Cross Appellant, City of Mesa



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I HEREBY CERTIFY that on the 5th day of September, 2017, I caused to be served a true and correct copy of the foregoing REPLY BRIEF OF RESPONDENT/CROSS APPELLANT to the following:

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